

DEC 1 - 2005

No. 05-585

In The
Supreme Court of the United States

ROSA PEREZ-PERDOMO, in her official capacity as
Secretary of Health of the Commonwealth of Puerto Rico,

Petitioner,

v.

WALGREEN CO.; WALGREEN OF SAN PATRICIO;
and WALGREEN OF PUERTO RICO,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF AMICUS CURIAE OF THE ASOCIACION
DE FARMACIAS DE LA COMUNIDAD DE PUERTO
RICO IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE**

Pursuant to Supreme Court Rule 37(3)(b), Asociación de Farmacias de Comunidad moves for leave to file the attached brief as *Amicus Curiae* in support of Petitioner, Rosa Pérez-Perdomo, Secretary, Puerto Rico Health Department. Petitioner has consented to the filing of this brief, but Respondents, Walgreen Co.; Walgreen of San Patricio and Walgreen of Puerto Rico, have refused consent, necessitating this motion.¹

Asociación de Farmacias de Comunidad ("Asociación"), a Puerto Rico nonprofit corporation, is a trade association founded in 1952. Its membership consists of over 750 pharmacies across the Commonwealth of Puerto Rico. Asociación has a long established purpose of ensuring and promoting high-quality health care services to the community.

The issue raised by this case is whether a "Certificate of Need" ("CON") program established in Puerto Rico under the auspices of the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 225 (repealed 1986) (the "1974 Act"), and which approximately 37 States still have in force, is repugnant dormant Commerce Clause doctrine. This issue is one of great import to the health care system in Puerto Rico, the beneficiaries of the system, and to the pharmacies community in general.

¹ Copy of the consent letter received from Petitioner's counsel was submitted with this Motion and *Amicus Curiae* Brief.

The U.S. Court of Appeals for the First Circuit's decision striking Puerto Rico's statute authorizing its CON program with regards to pharmacies, hampered the Commonwealth's "police power" to further health and welfare objectives embedded in the statute. Asociación therefore has a vital interest in the issue presented in this case, and its views and experience can assist the Court in resolving that issue.

For this reasons, Asociación de Farmacias de Comunidad, respectfully moves for leave to file the attached brief as *Amicus Curiae*.

Respectfully submitted, this 8th day of December, 2005.

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INTEREST OF THE *AMICUS*¹

Asociación de Farmacias de Comunidad ("Asociación"), a Puerto Rico nonprofit corporation, is a trade association founded in 1952. Its membership consists of over 750 pharmacies across the Commonwealth of Puerto Rico. Asociación has a long established mission of ensuring and promoting high-quality health care services to the community.

The issue raised by this case is whether a "Certificate of Need" ("CON") program established in Puerto Rico under the auspices of the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 225 (repealed 1986) (the "1974 Act"), and which approximately 37 States still have in force, is repugnant to dormant Commerce Clause doctrine. This issue is one of great import to the health care system in Puerto Rico, its beneficiaries, and the pharmacies community in general.

The U.S. Court of Appeals for the First Circuit's decision striking Puerto Rico's statute authorizing its CON program with regards to pharmacies, hampered the Commonwealth's "police power" to further health, safety, and welfare objectives embedded in the statute. Asociación therefore has a vital interest in the issue presented in this

¹ Pursuant to this Court's Rule 37.6, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for Petitioner has consented to the filing of this brief, and the letter of consent has been filed with the Clerk. On the other hand, Counsel of record for Respondents has withheld her consent, thus *Amicus* has filed the corresponding leave to file *amicus* brief.

case, and its views and experience can assist the Court in resolving that issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue raised by this case is whether a "Certificate of Need" ("CON") program established in Puerto Rico under the auspices of the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 225 (repealed 1986) (the "1974 Act"), and which approximately 37 States still have in force, is repugnant to dormant Commerce Clause doctrine. This issue is one of great import to the health care system in Puerto Rico, its beneficiaries, and the pharmacies community in general.

In response to the 1974 Act, Puerto Rico enacted the Certificate of Necessity and Convenience Act of the Commonwealth of Puerto Rico (hereinafter "the CNC Act"), 1975 P.R. Laws 2 (codified as amended at 24 P.R. Laws Ann. §§ 334-334j), which required health service providers to show that their services were needed in a particular locale before they commenced servicing the area. In 1979, the CNC Act was amended in order to include pharmacies as "health care facilities," which were also required to satisfy this showing of need. Law No. 189 of July 29, 1979, amending 24 P.R. Laws Ann. §§ 334 et seq.

Under the CNC petition process, the Secretary of Puerto Rico's Health Department must consider the "present and projected need of the population" affected by the transaction, and the existence of alternatives to the transaction or the possibility of providing the proposed services in a more efficient or less costly manner. 24 P.R.

Laws § 334b. Moreover, the Secretary must examine whether the proposed pharmacy will benefit "unattended populations" (i.e., low-income, disabled or elderly populations), among other criteria. See Art. VI of Regulation 56 at Cert. Pet. App. 99 and Art. VII of Regulation 112 at Cert. Pet. App. 162.

Even though the statute's seasoned lifespan, on April 22, 2005, the Court of Appeals struck down the CNC Act understanding that it "impermissibly discriminat[ed] against interstate commerce." *Walgreen Co. v. Rullán*, 405 F.3d 50 (1st Cir. 2005). The basis for such determination was in essence the fact that the statute grandfathered the pharmacies which existed on October 24, 1979 in Puerto Rico, exempting them from the certificate requirement. 24 P.R. Laws Ann. at § 334g. However, the fact that twelve of Respondent's pharmacies benefited from such enactment went unnoticed by the Court. In addition, the Court of Appeals emphasized the fact that the statute authorized that, during a new pharmacy's CNC application process, the existing pharmacies within a one-mile radius of the projected area may file an opposition. *Walgreen Co.*, 405 F.3d at 57. Thereupon, the Court of Appeals engaged in an analysis of several statistics regarding the certificates' issuance purporting to show discrimination intent against interstate commerce – which were the same statistics that the District Court determined were "insufficient to establish a pattern of discrimination." *Walgreen v. Rullán*, 292 F. Supp. 2d 298, 315 (D.P.R. 2003).

Asociación respectfully submits that the Court of Appeals strained its searching look where no sufficient evidence surfaced from the findings before the District Court. Consequently, the Court of Appeals should have applied the balancing test established in *Pike v. Bruce*

Church, Inc., 397 U.S. 137, 142 (1970). But it did not; thus, the case at bar's importance unveils. The Court of Appeals' determination poses a slippery slope for other states' CON programs which are still in effect. Even worst, the Court of Appeals' determination calls into question a state's legitimate police power to further health, safety, and welfare objectives.

Puerto Rico's health regulatory system, encouraged by the 1974 Act, established as one of its objectives the "present and projected need of the population," which included benefiting "unattended populations" (i.e., low-income, disabled or elderly populations). The record before the Court of Appeals lacks sufficient evidence showing that Puerto Rico's CNC measure failed to suit this rationale. When the State is not a party to a contract, "courts ordinarily defer, within broad limits, to the legislature's judgment about the reasonableness and necessity of a particular measure." See *Energy Reserves Group, Inc. v. Kan Power & Light Co.*, 459 U.S. 400, 412-13 (1983). Such deference was warranted in the instant case.

ARGUMENT

In response to the 1974 Act, Puerto Rico enacted the Certificate of Necessity and Convenience Act of the Commonwealth of Puerto Rico (hereinafter "the CNC Act"), 1975 P.R. Laws 2 (codified as amended at 24 P.R. Laws Ann. §§ 334-334j), which required health service providers to show that their services were needed in a particular locale before they commenced servicing the area. In 1979, the CNC Act was amended in order to include pharmacies as "health care facilities," which were also required to

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As stated before, even though the statute's seasoned lifespan, on April 22, 2005, the Court of Appeals struck down the CNC Act understanding that it "impermissibly discriminat[ed] against interstate commerce." *Walgreen Co. v. Rullán*, 405 F.3d 50 (1st Cir. 2005). The basis for such determination was in essence the fact that the statute grandfathered the pharmacies which existed on October 24, 1979 in Puerto Rico, exempting them from the certificate requirement. 24 P.R. Laws Ann. at § 334g. However, the fact that twelve of Respondent's pharmacies benefited from such enactment went unnoticed by the Court of Appeals.² In addition, the Court of Appeals emphasized

² The District Court affording the appropriate weight to this consideration stated: "The fact that an overwhelming majority of the pharmacies in the island prior to 1979 were locally-owned, and this group was relieved from having to undergo the CNC application process, does not lead the Court to adduce a protectionist intent from the statute. In fact, at the time of the CNC amendment, Walgreens had twelve (12) pharmacies operating in Puerto Rico. Hence, this group of
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